

STATE OF TENNESSEE

Office of the Attorney General



HERBERT H. SLATERY III
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

February 5, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of The Electric Power Board of Chattanooga, Tennessee, Petition
for Preemption of a Portion of Section 7-52-601 of the Tennessee Code Annotated
WC Docket No. 14-116

Dear Secretary Dortch:

I am writing on behalf of the Tennessee Attorney General's Office regarding the petition of the Electric Power Board of Chattanooga, Tennessee ("EPB") to the Commission. The EPB requests that the Commission preempt certain provisions of Tenn. Code Ann. § 7-52-601 that impose territorial restrictions on the EPB's provision of broadband service. This Office agrees with those providing comments who oppose the EPB's petition, particularly the National Conference of State Legislatures¹ and the National Association of Regulatory Utility Commissioners ("NARUC").² This Office also concurs with the comments and analysis of the State of North Carolina filed in WCB Docket No. 14-115, in which the City of Wilson makes a similar request for preemption of North Carolina law.³

The EPB's petition attempts to re-define the relationship between state and municipal governments.⁴ Of greatest concern is the potential challenge posed to state sovereignty. As an agency of the City of Chattanooga, the EPB "is but the creature of the [Tennessee] Legislature and may be abolished by it at any time." *Tennessee Electric Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 445, (1937). Its state-granted authority to provide broadband service extends only as far as the territorial restrictions in Tenn. Code Ann. § 7-52-601 permit.

The Commission does not have the authority to enlarge the authority of the EPB, an agency of a municipal government, to enable it to provide broadband or any other service—only

¹ Letter from William T. Pound, WCB Docket Nos. 14-115 and 14-116, August 28, 2014.

² Reply Comments of the National Association of Regulatory Utility Commissioner, WCB Docket Nos. 14-115 and 14-116, September 29, 2014

³ Comments of the State of North Carolina, WCB Docket No. 14-115, August 29, 2014.

⁴ See *id.* at 6.

the State of Tennessee has that authority. “[A]s a political subdivision of [a] state,” a municipality “cannot exceed the authority granted by the state and must accept the state’s election to limit that authority.” *XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1027 (8th Cir. 2004). See also *Manning v. City of Lebanon*, 124 S.W.3d 562, 565 (Tenn. Ct. App. 2003) (“Municipalities are . . . creatures of the legislature, and they may exercise the powers given them by the legislature so long as they do so in the manner the legislature prescribes.”)

It is well-settled that “[t]he regulation of utilities is one of the most important of the functions associated with the police power of the states.” *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983). The State of Tennessee has exercised that specific police power in enacting Tenn. Code Ann. § 7-52-601, which expressly limits the territory within which municipal electric plants may provide services such as broadband. While the Commission may regulate the provision of a telecommunication service that a local governmental unit is authorized by state law to provide, the Commission cannot expand the territorial jurisdiction of a local governmental unit since any such action would exceed the powers of a federal agency and manifestly infringe on the sovereignty of a state.

In *XO Missouri*, the United States Court of Appeals recited the fundamental principle that “[i]nherent police power belongs to the states. Political subdivisions of a state have no inherent claim to such power.” 362 F.3d at 1027. That decision rests upon the fundamental provisions of the Tenth Amendment to the United States Constitution, which states that “[t]he power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.” See 362 F.3d at 1027 (“Accordingly, the only police power a city may hold is police power conferred by the state.”) Neither Congress nor the federal agencies created by it can create units of local government or endow them with powers not conferred on them by the state.

Turning to the federal-law issue presented, Congress has not empowered the Commission to preempt state law as urged in this docket. This Office finds compelling North Carolina’s analysis of Section 706 of the Telecommunications Act in light of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).⁵ The Telecommunications Act itself, in Section 601(c), expressly precludes any implied preemption,⁶ thereby requiring a finding of express intent in this situation. As North Carolina points out, Congress’ intent to preempt “a power traditionally exercised by a state or local government”⁷ must be “unmistakably clear in the language of the statute.”⁸ Section 706 is not an “unmistakably clear” mandate to preempt state law.

Furthermore, Tennessee’s interest in its control over municipal governments, including the extent to which those governments are given authority to provide utility services, must be respected. Any preemption analysis involving “fields of traditional state regulation,” as are at issue in this docket, must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

⁵ See Comments of the State of North Carolina, WCB Docket No. 14-115, August 29, 2014, at 2-7.

⁶ See Comments of the State of North Carolina at 6.

⁷ *Id.* at 3.

⁸ *Gregory v. Ashcroft*, 501 U.S. at 460.

Congress." *Rice*, 331 U.S. at 230. Section 706 simply does not exhibit such a "clear and manifest purpose."

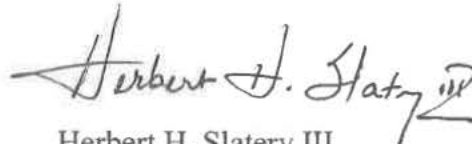
Any decision by the Commission to preempt Tenn. Code Ann. § 7-52-601, therefore, would leave the EPB, at best, in limbo; although the EPB might claim a federal law sanction to provide expanded broadband service, it would lack state authorization to do so. As Justice Souter, writing for the majority, aptly noted in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), regarding the Commission's decision not to preempt Missouri law, preemption would have only a limited and uncertain effect:

But what if the FCC did preempt the restriction? The municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business. There is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.

Id. at 135. Even if the Commission were to grant the EPB's petition, it would still need further legislative authorization to expand its service territory beyond existing geographical boundaries. The Commission action requested by the EPB would not only be ill-advised, but it would also not accomplish its stated purpose.

For these reasons, this Office respectfully requests that the Commission deny the EPB's petition.

Sincerely,

A handwritten signature in dark ink, appearing to read "Herbert H. Slatery III". The signature is fluid and cursive, with a large, stylized "H" and "S".

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Cc: Ron Ramsey, Lieutenant Governor
Beth Harwell, Speaker of the House of Representatives
Dwight Tarwater, Esq., General Counsel, Office of the Governor
Richard H. Bradford, Esq., Special Deputy Attorney General,
North Carolina Department of Justice